PP

v.

SHAH RIZAN AYOOB HUSSAIN & ANOR

HIGH COURT MALAYA, IPOH
BALIA YUSOF WAHI J
[CRIMINAL APPEAL NO: 45-14-2004]
3 DECEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Penal Code - Section 34 - Trafficking in cannabis in furtherance of a common intention - Evidence of agent provocateur - Whether failure by prosecution to lead said evidence fatal - Sale and purchase of drugs - Whether there was insufficient evidence to link drugs to both accused persons*

CRIMINAL PROCEDURE: *Prosecution - Witnesses - Agent provocateur - Whether prosecution's failure to lead evidence from agent provocateur fatal - Admissibility of statement made by agent provocateur recorded under s. 112 Criminal Procedure Code - Evidence Act 1950, s. 32*

CRIMINAL PROCEDURE: *Witness - Material witness - Agent provocateur - Whether prosecution's failure to lead evidence from agent provocateur fatal - Admissibility of statement made by agent provocateur recorded under s. 112 Criminal Procedure Code - Evidence Act 1950, s. 32*

CRIMINAL PROCEDURE: *Statements - Admissibility - Admissibility of statement made by agent provocateur recorded under s. 112 Criminal Procedure Code - Evidence Act 1950, s. 32*

EVIDENCE: *Agent provocateur - Admissibility of evidence - Whether prosecution's failure to lead evidence from agent provocateur fatal - Admissibility of statement made by agent provocateur recorded under s. 112 Criminal Procedure Code - Evidence Act 1950, s. 32*

EVIDENCE: *Statement - Statement of person who could not be called as witness - Admissibility of statement made by agent provocateur recorded under s. 112 Criminal Procedure Code - Evidence Act 1950, s. 32*

A ***EVIDENCE:*** *Witness - Prosecution's failure to call witness - Agent provocateur - Whether prosecution's failure to lead evidence from agent provocateur fatal - Admissibility of statement made by agent provocateur recorded under s. 112 Criminal Procedure Code - Evidence Act 1950, s. 32*

B

Both accused persons, in furtherance of a common intention, were charged with trafficking in dangerous drugs *ie*, 9743 grams of cannabis, an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 read together with s. 34 Penal Code. The issues required
C consideration were: (i) whether the failure of the prosecution to lead evidence from the agent provocateur was fatal; (ii) whether there was no evidence of trafficking, sale and purchase of the drugs; and (iii) whether there was insufficient evidence to link the drugs to both accused persons.

D **Held (acquitting and discharging both accused persons without calling for their defence):**

(1) On the facts, given the role played by the agent provocateur his evidence was essential to the prosecution's case. Since he was
E not available to testify, the prosecution attempted to introduce a statement he made (recorded under s. 112 Criminal Procedure Code ('CPC')) pursuant to s. 32 Evidence Act 1950 ('EA'). For the prosecution to rely on s. 32 EA, it is incumbent on their part to demonstrate to the court that every effort,
F reasonable in the circumstances of the case, to trace the witness and to ensure the witness's availability has been made. In the present case, no extra diligence had been shown and no serious efforts by the police had been made to ensure that the agent provocateur would be available for the trial. Although the
G hearing of the case commenced on 4 July 2006, the efforts made by the police to trace him were only made for the first time in February 2009. The prosecution should at that point of time have had all their witnesses ready for the trial. No subpoena was even issued for the agent provocateur. The
H prosecution would surely have considered the agent provocateur a material witness; otherwise his statement under s. 112 CPC would not have been recorded. An advertisement was placed in a Tamil newspaper, but it did not even say that the person sought was required to testify in court, let alone the time and
I place. It could only be concluded that the prosecution had no

urgency to get to this witness. Thus, the prosecution had failed to satisfy the court that the provisions of s. 32 EA had been complied with and it followed that the prosecution's attempt to make use of the s. 112 statement of the agent provocateur must fail. In the absence of the agent provocateur's evidence, a witness essential to the unfolding of the narrative on which the prosecution's case was based, there was a gap in the prosecution's case against both accused persons. On that ground alone, they were entitled to be acquitted. Furthermore, the evidence adduced by the prosecution certainly did not prove any transaction of the drugs between the two accused persons and the agent provocateur. Also, possession of the drugs was never proven and there was insufficient evidence to link the two accused persons to the drugs. (paras 25, 29, 30, 31, 32, 33, 36 & 37)

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC
Chan Pean Leon v. PP [1956] 1 LNS 17 HC
Chia Tian v. Rex [1937] MLJ 105
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC
PP v. Mohd Bandar Shah Nordin [2004] 1 LNS 574 HC
PP v. Chow Kam Meng [2001] 7 CLJ 387 HC
PP v. Dato Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC
PP v. Mogan Ayavoo [2004] 3 CLJ 623 HC
PP v. Mohamed Said [1982] 1 LNS 115 HC
PP v. Phua Keng Tong & 2 Other Appeals [1986] 1 LNS 129 HC
PP v. Saare Hama & Anor [2001] 4 CLJ 475 HC
Saminathan & Ors v. PP [1955] 1 LNS 138 HC
Syed Ali Syed Abdul Hamid v. Anor v. PP [1982] CLJ 188; [1982] CLJ (Rep) 340 SC
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC
Ti Chuee Hang v. PP [1995] 3 CLJ 1 FC
Tong Peng Hong v. PP [1955] 1 LNS 165 HC
Wong Chooi v. PP [1967] 1 LNS 207 HC

Legislation referred to:
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 2, 37(d), 40
Evidence Act 1950, ss. 32, 114(g)

For the 1st accused - Zulfahami Abu Bakar; M/s Ab Ghani Che Man & Co
- Gurubachan Singh; M/s Bachan & Kartar
For the 2nd accused - Tun Muhamad Amar; M/s Amar Aziz & Co
For the prosecution - Ahmad Ishrakh Saad DPP

Reported by Suresh Nathan

JUDGMENT

Balia Yusof Wahi J:

[1] Both the accused persons were charged as follows:

> Bahawa kamu pada 22 Jun jam lebih kurang 12.30 pagi, dalam mencapai niat bersama kamu, di tempat letak motokar Hotel Royal Casuarina, Jalan Gopeng Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak, telah mengedar dadah berbahaya iaitu cannabis seberat 9743 gram dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

The Prosecution Case

[2] On 21 June 2003, DSP Ravichandran a/l Ramachandran (SP7) has arranged for a sale transaction of 10 kilograms of cannabis between Detective Lance Corporal Ananthakrishnan (the agent provocateur) with the two accused persons at the Hotel Royal Casuarina, Jalan Gopeng, Ipoh, Perak.

[3] Prior to that, on 6 June 2003, SP7 was told by one Lance Corporal Hosni that a "source" was willing to cooperate with him to introduce a supplier to the agent provocateur. At about 10.20pm on the same day, SP7 arranged for a meeting to take place between the agent provocateur and the supplier at the Mc Donald's Restaurant in Juru Seberang Perai. The supplier was later identified by SP9, Sergeant Hasni Mohamad to be the two accused persons. The meeting between the agent provocateur and the two accused persons took place for about 20 minutes which was observed by SP9 who sat in the distance observing what transpired at the said restaurant. SP9 subsequently briefed SP7 on what took place at the restaurant. SP7 was also told by the agent provocateur that the two accused agreed to supply 20 kilos of ganja at a price of RM2,000 per kilogram.

[4] Subsequently, on 20 June 2003 the agent provocateur contacted SP7 informing him that the supplier can supply 10 kilograms and willing to come to Ipoh the next day.

[5] Following that, on 21 June 2003 SP7 held a briefing at his office giving specific instructions to his men of an impending drugs transaction taking place at the Hotel Royal Casuarina, Jalan Gopeng, Ipoh. Among others, besides giving instruction on the placement of his men, SP7 gave RM20,000 as a "flash roll money" to the agent provocateur for the purchase of the said drugs. SP7 and his men waited in ambush at the hotel while the agent provocateur waited at the hotel lobby.

[6] At about 10.30pm the two accused persons were seen coming to the hotel in a Proton Waja car bearing registration no. PFH 4122. The two proceeded to the hotel lobby and met the agent provocateur there. They were seen having a conversation with the agent provocateur and a few minutes later were seen leaving the hotel in the same car going towards the direction of Jalan Gopeng. SP7 was informed by the agent provocateur that the transaction will take place at the hotel car park.

[7] Subsequently at about 12.15am on 22 June 2003 a Proton Wira car bearing registration no. PEH 5530 driven by the first accused with the second accused seated at the front passenger seat was seen coming to the hotel parking area followed by the earlier Proton Waja car no. PFH 4122. After parking the car PEH 5530, the two accused were seen going into the lobby of the hotel again to meet the agent provocateur and after having a conversation for about 5-6 minutes, the agent provocateur gave the pre-arranged signal to SP7 to effect arrest on the two accused. The two accused were arrested in the hotel lobby near the lift.

[8] The two accused were taken to the Proton Waja Car PFH 4122 and nothing incriminating was found therein. The two were then taken to the Proton Wira car no. PEH5530 and with the key earlier seized from the first accused, the car was unlocked and an inspection carried out. During the inspection, SP7 found a box with the words 'vacuum clear Nihoma' (exh. P7A) written on it and upon closer examination was found to contain five white envelopes Nippon Express Malaysia (exhs. P8 A-E) each containing two slabs of compressed dried leaves believed to be ganja. Each slab was wrapped in aluminium paper and a plastic wrapping.

[9] Meanwhile, the occupants of the said Proton Waja car PFH 4122, two adult Malay men and a woman with a child were also arrested by the police party.

[10] The two accused persons and the exhibits recovered from the boot of the car were taken to the police headquarters together with the occupants of the Proton Waja car. The ten slabs of compressed dried leaves (exhs. P15-P24) were subsequently sent to the Chemist Department by the investigating officer SP11, Chief Inspector Syed Zainal Abidin and was found to contain 9,743 grammes of cannabis as defined under s. 2 of the Dangerous Drugs Act 1952.

[11] The evidence of SP7 as regard to the arrest of the accused and the seizure of the drugs at the hotel car park is corroborated by SP8 and SP9. SP8 assisted SP7 in the arrest of the two accused and the seizure of the drugs from the boot of the car.

[12] SP9 gave evidence that he went to Juru Seberang Prai on 6 June 2003 with Detective Lance Corporal Hosni to arrange a meeting between the agent provocateur and the two accused at the Mc Donald's Restaurant. On 21 June 2003 he attended the briefing at the police headquarters in Ipoh by SP7 and was assigned to do security coverage at the hotel later that night and corroborates the evidence of SP7 as to the subsequent arrest and seizure of the drugs from the said Proton Wira car PEH 5530.

[13] SP10, Inspector Norshahizam testified that he took over the investigation of this case and among the investigations that he did in the case was the attempts he made to trace the agent provocateur, Ananthakrishnan a/l Marimuthu who has since retired from the police force.

[14] The rest of the prosecution evidence come from the chemist SP5, photographers SP1 & SP2, personnel involved with the exhibits in the exhibit store of the Ipoh Police headquarters, SP3 and SP4 and the owner of the proton wira car PEH 5530, SP6 who rented out the car to the first accused. SP11 in carrying out his duties as the investigating officer of the case also recorded a statement under s. 112 of the Criminal Procedure Code from Ananthakrishnan a/l Marimuthu, the agent provocateur.

The Defence Contention

[15] It is submitted by the defence that there is a gap in the prosecution's case because of the failure to call certain material witnesses in particular the agent provocateur and the occupant of the other car, Rosmizal who has been detained at the rehabilitation centre in Simpang Renggam. It is also contended that there is no evidence of trafficking, sale and purchase of drugs and that the recovery of the drugs from the boot of the said car is insufficient to link it to the accused. It is also a part of the defence case that what took place at the hotel that night was not the whole truth. The two accused were arrested earlier after they first came to the hotel lobby at about 10pm and were brought to the IPD for interrogation. Subsequently they came back to the hotel for the second time around after midnight and were arrested with the drugs in the boot of the car.

The Court's Findings

[16] At the close of the case for the prosecution, the court ruled that the prosecution has failed to prove a *prima facie* case against both the accused persons and accordingly order that the two accused persons be acquitted and discharged without their defence being called.

[17] It is trite that to prove a *prima facie* case, the prosecution need to adduce evidence in its favour which is sufficient and strong for the defence to be called as to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side (*Saminathan & Ors v. PP* [1955] 1 LNS 138). *Prima facie* as stated by Azmi FCJ in *Tan Boon Kean v. PP* [1995] 4 CLJ 456 means:

> '*Prima facie*', means on the face of it or at first glance. So, 'a *prima facie* case' is a 'case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, is not conclusive' (see the *Oxford Companion to Law* at p 987). '*Prima facie* evidence' is evidence where 'a party's evidence in support of any issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence' (see *Cross on Evidence* (2nd Edn) at pp. 24 and 25; and also per Wee Chong Jin CJ in *Gan Soo Swee & Anor v. Ramoo* [1969] 1 MLJ 59 at p. 61).

[18] To elaborate further, in *PP v. Dato Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215 it has been held that:

> A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence is so probable that a prudent man ought to find upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that *prima facie* case has been made out in order to call for the defence.

[19] In the case of *PP v. Saare Hama & Anor* [2001] 4 CLJ 475, Justice Vincent Ng at p. 483 stated:

> In my view the prosecution could be ruled to have 'made out a *prima facie* case against the accused' when the probative force of the evidence on all the essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. It is therefore wrong for a judge or magistrate to require the prosecution to prove that the accused is actually guilty beyond reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial, and to reiterate, there is no duty on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution.

[20] The learned judge continued at p. 484 stating:

> Let me at the outset make clear in the current case this court is applying the *prima facie* standard of proof enunciated in cases *Pavone v. PP* [1984] 1 MLJ 77 and *Kumaraguru a/l Muniandy & Ors v. PP* [1994] 2 CLJ 53, as correctly submitted by the earned DPP. This would mean that in my deliberation to arrive at a decision whether to call the two accused to enter upon their defence, I would essentially have to ask myself whether convincing and credible evidence has been adduced by the prosecution which, if unrebutted, would warrant a conviction in other words whether if the defence is called and both accused elect to remain silent and call no witness

on their defence, could this court record a conviction? Further, I must in my deliberation, be also conscious and mindful of the trite and settled law, that features of evidence favourable to the accused, including any piece of testimony capable of rebutting any of the preemptions under the Act, could be legitimately gleaned from the very evidence led by the prosecution since the evidential burden may be discharged by the defence on evidence gathered from the prosecution case (See: *Wong Choi v. PP* [1967] 2 MLJ 180) I also recognize the principle that it is not open to this court, and indeed it is wholly unsafe and unjust to entertain in its mind the proposition which runs, to wit: 'I am making this ruling (calling the accused to enter on his defence) not because I am satisfied with the case of the prosecution but because I want the accused to explain himself.' (See *PP v. Saimin & Ors* [1971] 2 MLJ at page 16, *PP v. Ong Cheng Heong* [1998] 4 CLJ 209 at p. 240).

[21] Considering the totality of the evidence as led by the prosecution, I am in agreement with the submissions of the learned counsel for the accused that there is a gap in the prosecution's case. In his submissions, Mr Bachan Singh has pointed out that the failure of the prosecution to lead evidence from the agent provocateur is fatal. In fact he even went further and suggested that the failure to call Rosmizal, the occupant of the other car and the informer should attract the provisions of s. 114(g) of the Evidence Act.

[22] Having considered the circumstances and the factual matrix of the case and the part played by these witnesses, I do not think the provisions of s. 114(g) of the Evidence Act would apply. It is not established how and why Rosmizal would be material to the prosecution's case. He was just a passenger in the car Proton Waja PEH 4122 together with another male Malay and a woman with a child. As to the informer, his position is clearly stipulated in the provisions of s. 40 of the Dangerous Drugs Act 1952. From the evidence of SP7 and SP9, I am satisfied that the role of the informer is very minimal in that he is only responsible to introduce the accused to the agent provocateur at the McDonalds' Restaurant on 6 June 2003. The alleged offence against the two accused took place in the early hours of 22 June 2003. The informer was never involved in the events that took place at the hotel.

[23] While it is true that the prosecution has the discretion to call witnesses, that discretion however must be exercised having regard in the interests of justice, which includes being fair to the accused, and to call witnesses essential to the unfolding of the narratives on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution. Edgar Joseph Junior FCJ in *Ti Chuee Hang v. PP* [1995] 3 CLJ 1 has stated that:

> The most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation in which is nothing less than a statutory duty – the accused must be acquitted.

[24] In the said case, his lordship after having considered the circumstances of the case and the role played by the informer, concluded the informer had assumed the mantle of an agent provocateur and comes within the category of witnesses essential to the unfolding of the narratives on which the prosecution case is based.

[25] In my considered view, both Rosmizal and the informer do not come within the category of witnesses essential to the unfolding of the narratives on which the prosecution case in based. However, in the case of the agent provocateur, Ananthankrishnan a/l Marimuthu, my view is otherwise. Considering the role he played on 6 June 2003 and on the day of the transaction at the hotel lobby, his evidence is certainly most essential to the prosecution's case. In the course of giving his evidence, the investigating officer SP11, did record a statement under s. 112 of the Criminal Procedure Code from this witness. However, this witness was not available to testify in court. The prosecution instead, attempted to introduce the said s. 112 statement which was met with strong objections by the defence. The provisions of s. 32 of the Evidence Act were relied upon by the prosecution and after hearing submissions, of both the prosecution and the defence, I ruled that the said statement was not admissible.

[26] The prosecution through the evidence of SP10 sought to prove the attempts made by the police to trace the said witness who has retired from the police force either in 2005 or 2006. Among the attempts made by SP10 to trace the said witness was by going

through the pension records from which he managed to get the last known address and the identity card number of the said witness. He also went to the Jabatan Pendaftaran Negara on 25 February 2009 and to the Maxis office the following day. SP10 was told to make a detailed search at the JPN Headquarters in Putrajaya but he was not able to do so. He also went to the Immigration Department and was also told to do a further and detailed search at the headquarters in Putrajaya. He then faxed a letter to the Immigration headquarters in Putrajaya but there was no reply and he did nothing about it. In short, SP10 was not able to locate the witness at the address given to him which is at 360 Jalan Selama Serdang, Kedah.

[27] He then placed an advertisement in the New Straits Times and the Tamil Nanban on 11 March 2009 but did not get any response from the said advertisement. Only Tamil Nanban carried the advertisement on 12 March 2009.

[28] It is a fundamental rule of evidence that the best evidence available must be adduced in court. If anything less than the best is to be used as in this case where resort is made to rely on the provisions of s. 32 of the Evidence Act, the onus is on the prosecution to satisfy the court that the circumstances fall strictly within the said provision. In *Public Prosecutor v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747 Kang Kwee Gee (as he then was) stated at p. 755 as follows:

> It was held in the Federal Court case of *Sim Tiew Bee v. PP* [1973] 2 MLJ 200 that before the court could admit the statement of a witness as evidence under s. 32 of the Evidence Act, the condition precedent contemplated under the section must be satisfied. The condition precedent that the prosecution ought to satisfy in the present case was either to prove that the witness could not be procured, without an amount of delay or expense. The learned authors of *Sarkar's Law of Evidence* (14th edn) at p 649 state (relying on Indian authorities) that where no diligent search and reasonable exertion were made to procure the witness, the court could not come to a finding that the witness could not be found and therefore his statement could not be admitted under the section. Mere ignorance of the whereabouts of the witness is not sufficient to invoke the section. As the interpretation appears to be somewhat sound, I will, for the present case, adopt their view. It stands to reason that unless stringent conditions are prescribed and fulfilled, the established rule against the reception of hearsay evidence would

A be eroded; courts would have to accept as evidence statements which may not stand the vigours of cross-examination had the maker been called to give evidence.

[29] For the prosecution to rely on the provision of s. 32 of the Evidence Act it is incumbent on their part to demonstrate to the B court that every effort, reasonable in the circumstances of the case, to trace the witness and to ensure the witness availability has been made. The prosecution has all the resources and the powers to do that. Mohamad Azmi J (as he then was) in *Public Prosecutor v. Mohamed Said* [1982] 1 LNS 115 has this advice to the prosecution C in ensuring the availability of witnesses during trials before the court. His Lordship states:

> If a particular witness is material to the Prosecution case, it is the duty of the police to keep track of his whereabouts and take all D precautionary measures that they be informed of any change of address. Under section 34(ii) Criminal Procedure Code, the responsibility of serving summons or subpoenas on accused and witnesses are with police officers unless the court otherwise directs. If a particular witness is very material to the Prosecution case, it E stands to reason that the police must exercise extra diligence in applying for summons early and in taking all necessary steps to ensure that the correct address of the witness has been obtained bearing in mind the unreliability nowadays of the address given in Identity Cards. The correct address of material witnesses should be obtained at the first opportunity and, if necessary, the Police can F invoke sections 111 and 112 of the Criminal Procedure Code at the investigation stage. Section 111 empowers the Police to require their attendance at the police station so that they can be questioned under section 112. If they do not attend, then under sub-section (ii) of section 111, they may be compelled to attend by a Magistrate. (See *Chong Fook Kam & Anor v. Shaaban & Ors*). Where the G person to be summoned cannot by the exercise of due diligence be found, then under section 35(iv) Criminal Procedure Code, the summons may be served by leaving a copy thereof for him with some adult member of his family or with his servant residing with him. If service under section 35(iv), cannot be effected, then the H Prosecution should invoke section 36 Criminal Procedure Code by affixing a copy of the summons to some conspicuous part of the house or other place in which the person summoned ordinarily resides, if so directed by the court. When a witness fails to appear in court after being served under section 35 or 36, the Prosecution are then entitled to apply for warrant of arrest under section 47. I

(See also: *PP v. Mogan Ayavoo* [2004] 3 CLJ 623. *PP v. Chow Kam Meng* [2001] 7 CLJ 387).

[30] In the present case no extra diligence has been shown and no serious efforts by the police has been made to ensure that the said Ananthakrishnan a/l Marimuthu, the agent provocateur will be available for the trial. The efforts made by the police to trace him were only made for the first time in February 2009. The hearing of the case commenced on 4 July 2006. The prosecution should at that point of time have all their witnesses ready for the trial. No subpoena was even issued for the said witness. Surely the prosecution would have considered that this agent provocateur is a material witness for the prosecution. Otherwise his statement under s. 112 would not have been recorded.

[31] Although SP10 had placed an advertisement in two newspapers, only one newspaper carried it, the Tamil Nanban. The advertisement in Tamil and its translation in exhs. P40 and P40T does not even say that the person sought is required to testify in court, let alone the time and place. I can only conclude that the prosecution has no urgency to get to this witness. SP10 and SP11 gave evidence in court on 26 March 2009 and 27 March 2009, the last dates for the hearing. Considering the fact that the advertisement was made only on 12 March 2009, I think in the circumstances of the case, the period is too short. It is a last minute action. This does not demonstrate the seriousness of the prosecution in its efforts to comply with the strict provisions of s. 32 of the Evidence Act. As to the visit to the address, SP10 stated nothing more than "alamat tidak dapat dikesan kerana tidak lengkap, tidak tercatit nama kampong, estet dan Taman yang khusus". On his dealings with the Jabatan Imigresen, he merely gave evidence that "saya telah fax satu surat ke pejabat Imigresen Putrajaya dan sehingga sekarang tiada apa-apa jawapan".

[32] In the light of the evidence given by SP10, it is my considered view that the prosecution has failed to satisfy the court that the provisions of s. 32 of the Evidence Act 1950 has been complied with. Thus the attempt by the prosecution to make use of the s. 112 statement of the agent provocateur must fail.

[33] In the absence of the evidence of the agent provocateur, a witness essential to the unfolding of the narratives on which the prosecution case is based, I am of the view that there is a gap in the prosecution's case against the two accused and on that ground alone the accused are entitled to be acquitted. It is too plain and obvious that the agent provocateur played a very important role in the transaction. The two accused were seen coming to the hotel lobby twice to meet him and it was upon his signal given to the ambush party led by SP7 that led to their arrest and the subsequent recovery of the incriminating exhibits from the boot of the car. The RM20,000 'flash roll money' given to the agent provocateur purportedly to be used for the purchase of the drugs from the two accused persons was never accounted for. Only the agent provocateur would be able to account for it. All the other prosecution witnesses called were silent on this.

[34] During the prosecution's case, the defence has been attempting through cross-examination of the witnesses to throw doubt on the prosecution's case. The defence cannot be denied the right to cast doubt on the prosecution case during the prosecution case itself through cross-examination or by introducing relevant and material evidence either to cast doubt on the testimony of the prosecution witnesses or to expose them as liars. (See: *PP v. Mohd. Bandar Shah Nordin* [2004] 1 LNS 574, *Wong Chooi v. PP* [1967] 1 LNS 207, *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705).

[35] During cross-examination by the defence counsel, SP10 admitted that he knew the two accused persons were arrested near the hotel lift at 10pm and the drugs were recovered at about 12.20am but denies any knowledge that after that arrest, they were taken to the IPD for interrogation. SP7 however maintains that the two accused persons were only arrested after midnight on 21 June 2003. Be that as it may, there appears to be two conflicting versions as to what exactly happened that night with regard to the arrest of the two accused and there is doubt as to which version of the prosecution's case ought to be believed. It is the defence case that the accused were arrested earlier at about 10pm and brought to the IPD for interrogation and SP10 confirms it.

[36] The evidence as adduced by the prosecution certainly does not prove any sale transaction of the drugs found in the car between the two accused and the agent provocateur. No money was recovered from the accused except for RM50.00 found in the wallet of the first accused. The RM20,000 purportedly given by SP7 to the agent provocateur for the purchase of the drugs remains a mystery.

[37] Next to consider was whether the accused were in possession of the drugs found in the boot of the car. On the totality of the evidence, I find it most unsafe to conclude that the two accused were in possession. The prosecution definitely could not rely on the presumption under s. 37(d) of the Dangerous Drugs Act 1952 for the drugs found in the boot of the car (See: *Tong Peng Hong v. Public Prosecutor* [1955] 1 LNS 165, *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, *Syed Ali Syed Abdul Hamid v Anor v. PP* [1982] CLJ 188; [1982] CLJ (Rep) 340). It is basic that to prove trafficking as defined under s. 2 of the Dangerous Drugs Act 1952, there must be *mens rea* be it in the form of intent or knowledge. I find this to be lacking in the evidence of the prosecution. Of course knowledge may be inferred from the circumstances of the case, however, again I find that there is nothing that can be inferred as regards to the knowledge of accused to the drugs. The only evidence is that they were in the car before the arrest and that is not sufficient to infer any knowledge of the drugs found. Possession of the said drugs was never proven and there is insufficient evidence to link the two accused persons to the said drugs. (See: *Chia Tian v. Rex* [1937] MLJ 105, *Chan Pean Leon v. PP* [1956] 1 LNS 17, *PP v. Badrulsham Baharom* [1987] 1 LNS 72, *PP v. Phua Keng Tong & 2 Other Appeals* [1986] 1 LNS 129).

[38] On my analysis of the evidence adduced by the prosecution and having subject the same to maximum evaluation, I come to the conclusion that I am not able to answer the question in the affirmative. The pertinent question that I refer to is the question formulated by His Lordship Gopal Sri Ram JCA (as he then was) in the oft quoted case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734. At p. 752 of the report, in the passage relating to the task faced by the judge at the close of the case for the prosecution his Lordship states:

A It therefore follows that there is only one exercise that a judge sitting alone under Section 180 of the code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the B evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

[39] For the reasons above stated, I hereby acquit and discharge C the two accused without calling for their defence.

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